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FILED
FEB 27 1948

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No. [redacted] 19

ALFRED S. PENN,
Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOWELL HASTINGS,
DRENNAN J. SLATER,
400 West Madison Street,
Chicago, Illinois,
Attorneys for Respondent.

DRENNAN J. SLATER,
Of Counsel.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Plaintiff Failed to Prove the Allegations of His Complaint.

At the time the case went to the jury, the complaint contained the single charge that defendant "carelessly, negligently and unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act."

The Act of Congress upon which this suit is based is found in Title 45 U. S. C. A., par. 2, *et seq.*, passed March 2, 1893. Section 2 of this act makes it unlawful for a railroad to haul or use in interstate commerce a car "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Respondent contends that there was no substantial evidence to sustain the charge in plaintiff's complaint, and that therefore the Circuit Court of Appeals properly reversed the judgment and remanded the cause with directions to grant defendant's motion for judgment in its favor notwithstanding the verdict.

The purpose of Section 2 of the Safety Appliance Act has frequently been stated by this Court, one such case being *St. L. & San Francisco R. R.* v. *Conarty*, 238 U. S. 243, where the Court said at page 250:

> "It is very plain that the evils against which these provisions (Safety Appliance Acts) are directed are those which attended the old-fashioned link and pin couplings, where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling."

Courts of review have uniformly held that before a coupler case may be said to present a jury question under the circumstances here involved, three things must be shown:

(a) that the coupler failed to work;

(b) that an honest and reasonable effort to operate the coupler was made by the injured employee; and

(c) that the effort was made at a time when the coupler reasonably could have been expected to operate, *i. e.* when the slack was bunched.

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Cases stating the foregoing proposition to be the law are:

Chicago M. St. P. & P. R. Co. v. *Linehan*, 66 F. 2d 373 (C. C. A. 8).

Meisenhelder v. *Bryam*, 233 N. W. 849 (Minn.).

Western & Atl. RR. v. *Gentle*, 198 S. E. 257 (Ga. A.).

Chesapeake & O. Ry. Co. v. *Charlton*, 247 Fed. 34 (C. C. A. 4).

Devaney v. *A. T. & S. F. Ry. Co.*, 27 P. 2d 635 (Calif.).

No cases have been found which hold that the purpose of Section 2 of the Act is to impose on carriers the absolute duty to furnish couplers which, regardless of force exerted or any other condition or circumstance, uncouple instantly on the first attempt to pull the pin.

On the trial plaintiff admitted that on the day of the accident he signed an accident report (defendant's exhibit 3), in which he described the occurrence as follows: "I was pulling pins and conductor gave a cut sign and train was going a little fast and I got off to pull a pin and I stepped in track 35 switch and caught my heel in between switch rod and tie and turned my left ankle." (Rec. 39, 181, 182). The report makes no complaint of the coupling device.

On July 28, 1944 plaintiff signed a typewritten version of the occurrence (defendant's exhibit 4), and wrote at the bottom thereof the words "I have read this statement and it is true." In this statement plaintiff said: "I just did not look where I was stepping and stepped in between the tie and bridle. I was not interfered with by anyone else or any other cars. There was nothing wrong with any of the equipment that had anything to do with this accident" (Rec. 39, 59).

On November 15, 1944, plaintiff signed another typewritten narrative of the occurrence and wrote a similar acknowledgment to the effect that he had read the statement and that it was true (Rec. 40, 60, 61). In the November 15 statement plaintiff said that the car involved was an "oldtimer" and that "the pin lifter was about 3½ feet from where I hung on the ladder. This is further away than usual and I could not pull it because I did not have sufficient leverage stretched out as I was to pull out and up on the pin and hang on at the same time. There was nothing wrong with the pin lifter, as soon as I got off I pulled it all right and it operated properly. I do not know what the car number was, but do know that the pin lifter operated all right when I got off and pulled it." Each of these three statements was admitted in evidence without objection (Rec. 58, 59, 60).

In the complaint filed in the U. S. District Court plaintiff said:

> "The coupler device was out of order and would not work, and the plaintiff stepped down to the ground and had taken *one or two steps* in order to otherwise uncouple said cars and thereupon stepped into an open space between the ties in said road bed, and thereupon plaintiff's foot and ankle were broken and injured." (Italics ours).

This case has been tried twice—the first trial resulting in a disagreement. On the first trial plaintiff testified that after he alighted he took *three* or *four* steps (not one or two as stated in the complaint), then pulled the pin *twice,* and on the second pull the pin worked properly (Rec. 36). On the second trial plaintiff testified that he boarded the freight car to avoid unnecessary exertion, because it was hot, and it got pretty tiresome running 15 or 20 feet every few minutes in order to pull pins (Rec. 14); that as he rode in the stirrup on

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the side of the car he was "stretched out in an awkward position" (Rec. 37); that he alighted because he thought he would have better leverage to operate the pin lifter if he was off the car (Rec. 38). Plaintiff further stated that when he stepped down from the stirrup he took three or four steps during which time he tried to operate the pin lifter *three* times (once more than on the first trial) and succeeded on the third attempt (Rec. 16). Counsel for petitioner has here brought the number of attempts up to *four* (petn. p. 2). At the time of plaintiff's attempts to operate the pin lifter, the train was going at a speed of six or eight miles an hour (Rec. 17). If the speed of the train was, in fact, eight miles an hour this would mean the train was moving approximately 12 feet a second. If it is assumed that plaintiff took three or four running steps beside the train (not just one or two as stated in the complaint) plaintiff must have moved along with the train a distance of about 12 feet, during an elapsed time of approximately one second. It thus appears that the essence of plaintiff's complaint is that after he got into a proper position to operate the pin lifter it took him as much as a second to pull the pin. If one second is too long, how much time may elapse in pulling a pin without violating the Safety Appliance Act? No more than half a second? No more than a quarter of a second? We have searched the authorities in vain in an effort to locate a case where liability under the Safety Appliance Act was imposed on a carrier solely because a few efforts were required before the employe successfully uncoupled the cars. In each case we have found which involved a situation where the carrier was held liable for failure to furnish a proper coupler, either the coupler itself broke or the injured employe was wholly unable to effect an uncoupling by the use of the pin lifter.

We call attention to the fact that plaintiff's own testimony conclusively proves that the cars were uncoupled by the use of the pin lifter, and "without necessity of men going between the ends of the cars". Consequently, the charge in plaintiff's complaint that defendant unlawfully maintained a defective coupler "in that the same *could not be uncoupled* by means of the pin lifter" remains unproven. The rule that in Federal courts a plaintiff can recover only on the allegations of his pleadings and cannot recover on some other act appearing in the proof, is so well settled that it is necessary to cite only two of many such cases: *Southern Ry. Co.* v. *Montgomery*, 46 F. 2d 990 (C. C. A. 5) and *Sheffield* v. *Cantwell*, 101 F. 2d 351 (C. C. A. 7).

The basis for the petition for writ of *certiorari* filed herein is that "the Circuit Court of Appeals has erroneously decided the case upon a false factual situation", because the court erroneously found that plaintiff mounted the car next to the one to be uncoupled; that in truth plaintiff rode the car that was supposed to be cut off (petn. 5). The alleged error of the Circuit Court of Appeals in placing petitioner on the car next to the one to be cut off, rather than on the car to be cut off, is described as "egregious" (petn. 7).

In the first place, on page 4 of appellee's brief filed in this case in the United States Circuit Court of Appeals, counsel for petitioner herein said: "At the time of the accident the defendant intended to shunt a certain car onto a switch track, and to do so the *plaintiff stood upon the stirrup on the car next to the head car* in order that he might uncouple the car when it had attained sufficient momentum to carry it to its destination." (Italics ours).

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In the second place, it is perfectly clear that the opinion of the Circuit Court of Appeals is not based on which car plaintiff was riding, but is founded on the proposition that the evidence was insufficient to prove a coupler defect within the meaning of the Safety Appliance Act. As the Circuit Court of Appeals pointed out, it is plain that petitioner was not in a proper position to operate the coupler. Whether plaintiff's awkward position was caused by his riding on one car or the other is immaterial. Recognizing the fact that he was in an unhandy position, plaintiff stepped to the ground for the purpose of performing the operation. The fact that the pin did not lift while plaintiff was awkardly positioned, but did lift when petitioner got to a place where he could make an honest and reasonable effort, dispels any inference of coupler defect which might possibly arise. Plaintiff's testimony on the trial that when he first pulled the pin it should have come but didn't (Rec. 16) is nothing but an unsupported opinion on an ultimate issue and is without any probative force. As stated by the text in "Opinion Evidence in Illinois" by King & Pillinger at page 320:

> "In cases other than sanity and land value cases, the courts have frequently referred to 'naked opinions' or 'unsupported opinions' on ultimate issues as without any probative force (citing cases)."

We respectfully submit that the only way in which a recovery can be allowed in this case is to treat the Federal Employers' Liability Act as one which imposes upon carriers liability without deficiency or fault. Such imposition of liability, however, is utterly inconsistent with the fact that up to the present time Congress has seen fit to have liability for injuries by railroad employes based solely on proof of fault, and that it is not for the court to torture and twist this Act of Congress so as to make it become a law not of liability for fault but liability for injuries.

On page 10 petitioner cites the case of *Myers* v. *Reading Co.*, 331 U. S. 477. That case does not involve a coupling device. It involves an entirely different statute from the one here under consideration. The question before the court in the *Myers* case was whether the hand brake upon which plaintiff was working when injured complied with the provision of the statute that "all cars must be equipped with secure sill steps and *efficient* hand brakes". This court held that it was a question of fact for the jury to decide whether the hand brake which unexpectedly spun around was an "efficient one within the meaning of the statutory requirement". We fail to see how the statute involved in the *Myers* case has any bearing on the section involved in the case at bar. Counsel's reference to the *Myers* case indicates that he has become confused as to which act applies, possibly because of the fact that two sections of the Safety Appliance Acts are numbered "2". The first "Section 2", and the one involved in the instant case, is contained in Title 45 U. S. C. A., paragraph 2, and is part of the Act of Congress passed March 2, 1893. The other "Section 2", and the one involved in the *Myers* case, is contained in Title 45 U. S. C. A., paragraph 11, and is part of the Act of Congress passed April 14, 1910. Obviously, these two acts are wholly independent. The fact that the word "efficient" is used in the hand brake section does not mean that the same standard is required in the coupler section.

On page 10 of the petition, counsel makes the amazing suggestion that even if he failed to adduce substantial evidence to support the complaint, a new trial, nevertheless, should be awarded "in order to allow the plaintiff to produce other sufficient evidence of the defectiveness of the pin lifter." *Stewart* v. *Southern Ry.*, 315 U. S. 283, is cited in support of the proposition that a

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new trial should be granted for the purpose of permitting the introduction of further evidence. There is no merit whatsoever to counsel's suggestion. Plaintiff made no complaint about the coupler and consequently defendant's car inspectors did not examine this car. Actually, defendant's conductor, Wescott, testified he used the pin lifter soon after the occurrence and the coupler functioned properly (Rec. 82). We know of no further evidence which could be adduced on the subject of the operation of the coupler. Counsel for plaintiff suggests none. All agree that the car *was* uncoupled by the use of the pin lifter.

II.

In the Present State of the Record, There Is No Basis for Reversing the Circuit Court of Appeals and Affirming the Judgment for Plaintiff.

On defendant's appeal from the District Court to the Circuit Court of Appeals, two propositions of law were relied on:

(1) The court erred in refusing to grant defendant's motion to instruct the jury to find defendant not guilty; and

(2) The court erred in giving to the jury plaintiff's instruction E.

It is so stated in the third paragraph of the opinion of the Circuit Court of Appeals. Because the Circuit Court of Appeals concluded that there was no substantial evidence to sustain the verdict, and for that reason remanded with directions to enter a judgent notwithstanding the verdict, it was not necessary for the Circuit Court of Appeals to pass on the errors complained of in instruction E. Manifestly, therefore, there is no ground for reinstating the District Court judgment.

III.

This Is Not the Type of Case Which Should Be Taken By the Supreme Court of the United States.

As noted above, plaintiff bases his petition to this court on the contention that the Circuit Court of Appeals has erroneously decided the case upon a "false factual situation" (petn. 5).

We respectfully submit that the policy of this court should be to abstain from taking a case, even though it might have been erroneously decided below, if the decision does not involve an important question of law, does not create a diversity of decisions in the lower courts, or does not seriously affect the administration of law in other cases. This should be true, particularly where, as here, the decision below recognizes the controlling legal principles but is claimed to have applied them improperly to the specific facts disclosed. We submit that it is irrelevant to the exercise of the power of review of this court that if it had been charged with the responsibility of a trial judge or a member of the court below, it might have held the case one for submission to a jury. In the instant case there have been two jury trials and one hearing in a reviewing court. Plaintiff's injuries resulting from the occurrence in question (fractures of the left ankle) were not permanently disabling, and he was able to return to work a few months after the accident. He worked at various jobs up until the time of the first trial, but then abstained from work. Motion pictures introduced in evidence showed that petitioner was able to walk without any visible limp and do tasks which involved considerable strain and effort (Rec. 133). If in such a case as this the Supreme Court of the United States accords a third hearing, this court will have little time or opportunity to do anything else

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but examine the claims of plaintiffs and defendants, that, in the special circumstances disclosed, prejudicial errors have been committed. It is our contention that there is no reason why a preference should be given to actions brought under the Federal Employers' Liability Act over those founded on other Federal statutes.

The granting of the petition for *certiorari* in this case would undoubtedly be an additional reason for lower court judges to avoid reversals by arbitrarily deciding for plaintiffs in Federal Employers' Liability Act cases, confident that such decisions are not likely to be reviewed in this court.

We submit that on the law and the facts the Circuit Court of Appeals has correctly decided this case. There is nothing to be gained by reviewing alleged errors which at most present questions of fact. Accordingly the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

LOWELL HASTINGS,
DRENNAN J. SLATER,
Attorneys for Respondent.

DRENNAN J. SLATER,
Of Counsel.